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Supreme Court, U.S.
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No. 04-952

In The Supreme Court of the United States

CHOLLA READY MIX, INC.,

Petitioner,

v.

VICTOR MENDEZ, Secretary of the Arizona Department of Transportation (ADOT); JEFF SWAN, ADOT Holbrook District Engineer; WILLIAM BELT, ADOT Environmental Planning Services Department; THOR ANDERSON, ADOT Official; RICHARD DUARTE, ADOT Environmental Planning Section Manager; BETTINA ROSENBERG, ADOT Historic Preservation Coordinator; JAMES GARRISON, Arizona State Historic Preservation Officer; and ROBERT GASSER, Arizona Parks Department Compliance Officer,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF OF PETITIONER

WILLIAM PERRY PENDLEY*
**Counsel of Record*
CHRISTOPHER T. MASSEY
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
Attorneys for Petitioner

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OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether a decision by state officials to bar a landowner from using his private property because some American Indians assert that the land is "sacred" violates the Establishment Clause notwithstanding claims by state officials that the "sacredness" of the land is historically and culturally important to those Indians?

2. Whether a complaint alleging an Establishment Clause violation, which satisfies notice pleading, may be dismissed for not alleging facts sufficient to establish a *prima facie* case under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), given the holding of this Court in *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002)?

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SUMMARY OF ARGUMENT

Arizona officials acknowledge that the Ninth Circuit's creation of a heightened pleading standard, to the level of proof of a *prima facie* Establishment Clause case, conflicts with the holdings of this Court and the Courts of Appeals. Resp. Br. 13. They contend, nonetheless, that the Ninth Circuit's ruling is not worthy of *certiorari*. Resp. Br. 4, 12. In so contending, however, Arizona officials ignore the radical break with and the gross damage done to this Court's Establishment Clause jurisprudence by the Ninth Circuit's published opinion. *See, Cholla Ready Mix, Inc. v. Mendez, et al.*, 382 F.3d 969 (9th Cir. 2004).

For, with *Cholla*, the Ninth Circuit has held that, because of the "unique status of Native American societies" and the historical and cultural importance that those societies ascribe to physical locations, including the land owned by Cholla, the Establishment Clause does not forbid barring Cholla from using its land because that land is "sacred" to some American Indians. Thus, for the 663,242,880 acres that lie within the states that comprise the Ninth Circuit, which land mass constitutes thirty-eight percent of the United States,[1] the Ninth Circuit has established binding precedent that allows state and federal officials to close public and private land to use because American Indians assert that it is "sacred" to them so long as those officials also maintain that the land is also "historically and culturally important" to those American Indians.

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[1] *Public Land Statistics 1992*, U.S. Department of the Interior, Bureau of Land Management, September 1993, Vol. 177, p. 5.

The Ninth Circuit's marked departure from and abandonment of this Court's and the Courts of Appeals' Establishment Clause jurisprudence, in response to a Rule 12(b)(6) motion to dismiss, merits this Court's review by granting Cholla's Petition.

ARGUMENT IN REPLY

I. THE NINTH CIRCUIT'S HEIGHTENED PLEADING STANDARD FOR ESTABLISHMENT CLAUSE CLAIMS CONFLICTS WITH THE HOLDINGS OF THIS COURT AND THE COURTS OF APPEALS.

This Court has never held that the requirements for establishing a *prima facie* Establishment Clause violation under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), also apply to the pleading standard that plaintiffs must satisfy to survive a Rule 12(b)(6) motion to dismiss. Although Arizona officials concede that courts may not require plaintiffs to go beyond the pleading requirements of Rule 8(a)(2), they argue that the Ninth Circuit did not affirm the dismissal of Cholla's Complaint because Cholla failed to plead facts necessary to establish a *prima facie* case. Resp. Br. 13. Yet, that is precisely what the Ninth Circuit demanded of Cholla: "Cholla has alleged *no facts* that would support a conclusion that [Arizona officials] were not motivated at least in part by [a] secular purpose[,]" App. 9 (emphasis added); "[t]here is *no suggestion* that [Arizona officials] favor tribal religion over other religions or that they would not protect sites of historical, cultural, and religious importance to other groups[,]" App. 11 (emphasis added); "Cholla has *not alleged facts* that would support an inference that [Arizona officials'] actions foster excessive government entanglement with religion[,]" App.

12 (emphasis added); and "Cholla *does not allege* that [Arizona officials] participate in the Tribe's religious practices, inquire about the substance of their religious views, or monitor their religious practices." App. 13 (emphasis added).

The Ninth Circuit's holding conflicts with this Court's holdings, which provide that a complaint must include only "a short and plain statement of the claim[:] showing that the pleader is entitled to relief," *Swierkiewicz v. Sorema*, 534 U.S. 506, 512 (2002), and putting the defendant on notice of the nature of the claim, *Conley v. Gibson*, 355 U.S. 41, 47 (1957). In fact, this Court has rejected consistently use of a heightened pleading standard. *See, Swierkiewicz*, 534 U.S. at 512 (heightened pleading standards in employment discrimination cases conflict with Rule 8(a)(2)); *Conley*, 355 U.S. at 47 (a civil rights claimant need only set forth a short and plain statement of the claim sufficient to provide fair notice); *Scheuer v. Rhodes*, 416 U.S. 232, 236, 250 (1974) (remoteness of recovery in a civil rights action is not the test, rather, the pleader should be allowed to proceed through discovery and then summary judgment or trial); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (heightened pleading standards for civil rights plaintiffs are improper).

The Courts of Appeals are in accord and have held consistently in employment discrimination and civil rights cases, for example, that a heightened pleading standard may not be applied at the pleading stage to assess the adequacy of a complaint under the notice pleading requirements of Rule 8(a)(2). *See, e.g., Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1113 (D.C. Cir. 2000) (plaintiff did not have to make out a *prima facie* case of discrimination in his

complaint); *Weston v. Commonwealth of Pennsylvania*, 251 F.3d 420, 429 (3rd Cir. 2001) (denouncing any requirement for fact pleading and holding that "[d]iscrimination and other civil rights claims are clearly subject to notice pleading"); *Bennett v. Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998) (complaint need not set out the elements of a *prima facie* case: "I was turned down for a job because of my race is all a complaint has to say"); *Ring v. First Interstate Mortgage, Inc.*, 984 F.2d 924, 926 (8th Cir. 1993) ("Under the Federal Rules of Civil Procedure, an evidentiary standard is not a proper measure of whether a complaint fails to state a claim").

Pursuant to the holdings of this Court and the Courts of Appeals, Cholla need only satisfy the notice pleading requirements of Rule 8(a)(2), which it did by alleging a violation of the Establishment Clause under each part of the *Lemon* test. App. 68-69; *Lemon*, 430 U.S. at 612-13. First, Cholla alleged that "[t]he purpose of [Arizona officials'] policy, the challenged regulations, and the denial of Cholla's application for a commercial source number is not secular[,]" but rather endorses the religion of the Hopi, Navajo, and Zuni Indian Tribes. App. 68. Second, Cholla alleged that "[t]he principle effect of [Arizona officials'] policy, the challenged regulations, and the denial of Cholla's application for a commercial source number is the advancement or protection of religion[,]" more specifically, the religion practiced by Hopi, Navajo, and Zuni Indian Tribes. App. 69. Third, Cholla alleged that "[Arizona officials'] policy, the challenged regulations, and the denial of Cholla's application for a commercial source number foster excessive government entanglement with [the] religion" of the Hopi, Navajo, and Zuni Indian Tribes. App. 69. Cholla further alleged specific harm as a result of the challenged regulations, Arizona officials' policy, and the

denial of Cholla's application for a commercial source number. App. 69. Finally, consistent with this Court's declaration that, "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a religion or religious faith, or tends to do so,'" *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984)), Cholla alleged that Arizona officials coerced Cholla to recognize and support the religion and beliefs of the Hopi, Navajo, and Zuni Indian tribes through the implementation of the challenged regulations, Arizona officials' policy, and the denial of Cholla's application for a commercial source number.

Nonetheless, instead of adhering to the holdings of this Court, the Ninth Circuit demanded that Cholla provide "facts" to demonstrate, for example, that Arizona officials were not motivated by a secular purpose, App. 9, "facts" to demonstrate that Arizona officials preferred American Indian religion over other religions, App. 11, and "facts" to demonstrate that all of the elements of the *Lemon* test had been met, App. 12-13. It is expressly because these "facts," necessary to establish a *prima facie* Establishment Clause claim, were missing from Cholla's Complaint that the Ninth Circuit affirmed the dismissal of Cholla's claim. *See,* App. 15.

Accordingly, the Ninth Circuit's decision conflicts with the decisions of this Court and the Courts of Appeals. Moreover, the Ninth Circuit's holding "so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a). Therefore, Cholla's Petition should be granted.

II. THE NINTH CIRCUIT'S RULING CREATES AN ESTABLISHMENT CLAUSE TEST UNIQUE TO AMERICAN INDIAN RELIGION THAT CONFLICTS WITH THE HOLDINGS OF THIS COURT AND THE COURTS OF APPEALS.

In dismissing Cholla's Complaint, the Ninth Circuit held that Cholla's allegations were "premised on flawed analysis of governing law" as to what constitutes a violation of the Establishment Clause. App. 8. Thereupon, the Ninth Circuit set forth its unique view of the "governing law" when an individual alleges that government action regarding American Indian religion violates the Establishment Clause. App. 8-13.

In the Ninth Circuit's view, which conflicts with the holdings of this Court and the Courts of Appeals, the "unique status of Native American societies" and that they regard "sacred" lands to be "historically and culturally important" render any governmental closure of public or private land purportedly "sacred" to them immune from an Establishment Clause challenge.[2] App. 9-10. More specifically, the Ninth Circuit held:

> In conclusion, the Establishment Clause does not bar the government from protecting an historically and culturally important site simply because the

[2] The Ninth Circuit's view of the unique status of American Indian religion creates a clear conflict. *See, Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451-52 (1988) (demands for privacy in a National Forest considered sacred by American Indians cannot justify the government's closure of public lands, even temporarily); *see also, Badoni v. Higginson*, 638 F.2d 172, 179 (10th Cir. 1980) ("Issuance of regulations to exclude tourists completely . . . for the [] purpose of aiding [American Indians'] conduct of religious ceremonies would seem a clear violation of the Establishment Clause").

> site's importance derives at least in part from its sacredness to certain groups.

App. 13. Likewise, Arizona officials argue, without evidence, that their challenged regulations and policy have an "obvious" and "unmistakably" secular purpose because they barred any use of Cholla's land, not only because of its religious significance, but also because of its historical and cultural importance to American Indians.[3] Resp. Br. 5-6.

This Court's Establishment Clause analysis asks whether government has "demonstrate[d] a preference for one particular sect or creed [ ]" that may reasonably be perceived as government endorsement of religion, *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 605 (1989); *see also, Lynch*, 465 U.S. at 687 (O'Connor, J., concurring), because the Establishment Clause "prohibits government from appearing to take a position on questions of religious belief. . . ." *Allegheny County*, 492 U.S. at 593-94. This analysis applies even when the religious symbols

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[3] In *ACLU of KY, et al. v. McCreary County, et al.*, now before this Court, plaintiffs were allowed to present evidence that the sole reason for placing the Ten Commandments in the courthouse was a religious one, notwithstanding McCreary County's claim that the display was of historical or cultural importance to its citizens. *McCreary County*, 354 F.3d at 458-62. Here, the Ninth Circuit dismissed Cholla's Complaint without allowing Cholla the opportunity to present evidence. Although Cholla's Complaint alleges that Cholla was barred from using its land solely because of the land's religious significance to American Indians, its Complaint was dismissed either because Arizona officials' attorneys argued, without evidence, in their motion to dismiss that Arizona officials barred use of Cholla's land because it is "historically and culturally important" to American Indians, or because, under the Ninth Circuit's unique view of the "governing law," any Establishment Clause challenge to the endorsement of American Indian religious symbols fails if the officials claim that the symbols are "historically and culturally important" to those American Indians. Both bases are in conflict with the holdings of this Court and the Courts of Appeals.

in question have historical and cultural attributes. However, under the Ninth Circuit's unique test here, which applies only to American Indian religion, the mere existence of such historical and cultural attributes saves government endorsed American Indian religious symbols from Establishment Clause scrutiny.

For example, in *Allegheny County*, this Court held that a crèche, which was topped with an angel bearing a banner proclaiming "Gloria in Excelsis Deo!", violated the Establishment Clause because the display could be seen as a government endorsement of Christmas "as a Christian holy day." *Id.* at 601. Thus, despite the crèche's "historical" and "cultural" significance in the Christian religion, its display by Allegheny County was unconstitutional. *Id.* at 598. In conflict with *Allegheny County*, the Ninth Circuit held, as to American Indian religion, that the "historical[] and cultural[] importan[ce]" to American Indians of an American Indian religious symbol endorsed by government bars any challenge to that endorsement under the Establishment Clause. App. 13.

That the Ninth Circuit's use of the historical and cultural attributes of religious symbols is unique to American Indian religion is clear from two related Ninth Circuit rulings with regard to Christian religious symbols, one issued only weeks before the Ninth Circuit's ruling in *Cholla*. *See, Buono v. Norton*, 371 F.3d 543 (9th Cir. 2004) (presence of cross designated as a World War I memorial in a national preserve violated the Establishment Clause);[4] *Separation of Church and State Committee v. City of Eugene*, 93 F.3d 617 (9th Cir. 1996) (Latin cross in a city

[4] *Buono* was decided on June 7, 2004; *Cholla* was decided on September 1, 2004.

park erected in 1964 that was a memorial in honor of war veterans violated Establishment Clause). In both *Buono* and *Separation of Church and State Committee*, the Ninth Circuit held that, despite the "historical" and "cultural" significance of the symbols as war memorials, the display of these symbols violated the Establishment Clause under *Lemon* and *Allegheny*. *See, Buono*, 371 F.3d at 550; *Separation of Church and State Committee*, 93 F.3d at 619-20.

The Courts of Appeals agree. *See, Kaplan v. City of Burlington*, 891 F.2d 1024 (2nd Cir. 1989), *cert. denied*, 496 U.S. 926 (1990) (display of a menorah in a city park violated Establishment Clause despite "cultural" significance to the community); *ACLU of KY, et al. v. McCreary County, et al.*, 354 F.3d 438 (6th Cir. 2003), *cert. granted*, 125 S.Ct. 346 (2004) (display of Ten Commandments was unconstitutional despite its "historical" importance); *Harris v. City of Zion, Lake County, IL*, 927 F.2d 1401 (7th Cir. 1991), *cert. denied*, *City of Rolling Meadows v. Kuhn*, 505 U.S. 1244 (1992) (presence of religious symbols on city seal represent unconstitutional endorsement of Christianity regardless of the seal's "historical" significance).

Moreover, as is clear from Part I above, the Ninth Circuit reached its unique holding, which it published, in response to a Rule 12(b)(6) motion to dismiss. App. 1-15. Thus, the Ninth Circuit's conclusion – that Arizona officials' ban on the use of Cholla's land due to its religious significance to American Indians was not unconstitutional because Cholla's land was also "historically and culturally important" to American Indians – was based, not upon facts found by the District Court or even answers filed in response to Cholla's Complaint, but upon arguments made by Arizona officials' attorneys in their motion to dismiss. State Defendants' Motion to Dismiss at 10-13. Nonetheless,

the Ninth Circuit's holding in *Cholla* is now binding precedent for nine states whose vast land mass comprises thirty-eight percent of the United States. For state and federal land users and private land owners within those states, state and federal officials may close public and private land to use because those lands are considered "sacred" to American Indians. Those closures may occur without fear of scrutiny under the Establishment Clause so long as those state and federal officials assert, and those American Indians claim, that the lands are of "historical" and "cultural" importance to those American Indians.

Accordingly, the Ninth Circuit's unique view of the "governing law" when an individual alleges that government action regarding American Indian religion violates the Establishment Clause conflicts with the holdings of this Court and Courts of Appeals. This Court should grant Cholla's Petition to resolve this conflict.

CONCLUSION

For the foregoing reasons, Cholla Ready Mix, Inc., respectfully requests that this Court grant its Petition.

Respectfully submitted,

WILLIAM PERRY PENDLEY, ESQ.*
**Counsel of Record*
CHRISTOPHER T. MASSEY, ESQ.
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021

Attorneys for Petitioner

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